86-404 (1)

Supreme Court, U.S.
FILED
JUN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

(case #)

U.S. Supreme Court

October, 1985

CERTIORARI

D.D.WHALEY-Petitioner v USA Et Al Respondents

CRIMINAL TRIAL, CONVICTION, APPEAL ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION ON WRIT OF CERTIORARI

Dorian D. Whaley
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(609) 348-0977

Dorian D Whaley

Was Whaley's criminal conviction just under Law United States Code Title 18 S 2314:?

When the Court Adopted the U.S. Attorney's jury instruction and erroneously instructed the jury "if there is no market value for the property the jury should consider other reasonable methods."

(R.T. 259) (R.T. 283)

When the U.S. did not present a scintilla of factual evidence to prove Whaley was ever at any time or place in possession of the article alleged transported and the Court erroneously instructed the jury; "You may from those facts draw the inference that the boat was transported in inter-state commerce by the accused", making the assumption of possession of the article by the accused.

(R.T. 211) (R.T. 261)

When upon controversy raised by Whaley concerning justness of vessel classified as goods and merchandise the Court at preliminary hearing directed "Vessel was subject of commerce and is chattels and as such is goods and merchandise, " bringing said article into the scope of the Statute and forclosed from the jury deliberation upon the matter (So. District Court Ca. Hearing U.S. v Whaley 84-0600G October 3, 1984)

When Whaley did not have speedy trial as Court automatically, unjustly excluded days from Whaley's statutory mandated trial schedule assigning automatic delay to Whaley upon his filing a pretrial motion yet none will or can describe any circumstances raised in Whaley's motion which would result in the delay attributed by the Court to the motion.

(Opinion April 25, 1986 Ninth Circuit Court of Appeals #85 5026 pp 1-4)

"I hereby object to being charged with transportation of vessel under Title 18 USC sec 2314. Vessel is not defined under Title 18 USC sec. 2134 nor has vessel been defined by any trial proceedings on record to date under Title 18 USC sec. 2314.

The indictment wherein I am charged with this offense amounts to a false indictment. The Court having rectitude will the court countenance and approve further proceedings with this indictment."

ENTIRE PERTINENT TEXT OF WHALEYS MOTION

When Whaley was further denied due process of law as the Court issued subpoenas to foreign nationals and Whaley was subjected to a single person showup for no exigent circumstance before all the foreign nationals at the same time who the next day identified Whaley at trial. Two of which committed purjury proscribed by United Stated Code Title 18 S 1623 (C). (R.T. November 16, 1984 20-24) (R.T. 61) (R.T. 280)

When Whaley was denied effective assistance of Counsel as Squibb raised obstacles to Whaley's pursuit of due process, refusal to pursue in Whaley's interest relief mandated by United States Code Title 18 S 3164, did not take open exception with the Court concerning the owners testimony as the sole evidence of value of the article alledged transported. Such is against the basic rules of evidence in Federal criminal procedure. Federal Rule 104 (b)

When the Court over Whaley's designs assigned Counsel and denied Whaley's right to proceed in propria persona. (R.T. 9, 10)

When bail for Whaley was punitive, excessive, capricious and whimsical.

When Whaley's lawful civil rights were injured and oppressed as the record for appeal was falsly presented certified forwarded as complete by the Reporter Clerk and Deputy when the order for the record and subsequent Court documents show there were absent parts in the certified complete as ordered record. (Certificate of Record Court Documents)

When Whaley suffers stigma of felony conviction and continued constraints attendant to custodial restrictions.

When the Court denied Whaley his selected expert witness language translator.

R.J. COUGHLIN, JR.

MICHAEL SQUIBB

RICHARD BARNETT

STEPHEN HOFFMAN

DAVID CURNOW

CARL YAEKEL

EZEKIEL CORTEZ

JUDGE EARL B. GILLIAM

A.U.S.A. JUDITH HAYES

JUDGE GOODWIN
JUDGE SKOPIL
JUDGE ALARCON
JUDGE TANG — NINTH CIRCUIT COURT OF APPEALS
JUDGE BOOCHEVEL — JUDGES
JUDGE WALLACE
JUDGE HUG
JUDGE NOTRIS

REPORTER THELMA STROBEL

CLERK - WM. W. LUDDY

DEPUTY CLERK - GREGORY J. MEDEIROS

WITNESSES

GEORGE MILLAR
JORGE MURILLO
DAVILA-GUTERREZ
GAMEZ-HOLGUIN
JESUS FLORES
DOUGLAS K. LAYTON
DAVID L. OLEK
JACK DIVINE
ROBERT CAPOTINACH
ROBERT E. HAMMOND

Modified judgement commitment order February 20, 1985 of judgement commitment order November 21, 1984 by Earl B. Gilliam U.S. District Judge So. District, Ca.

United States Code Title 18 S 3772 Supreme Court jurisdiction of appeal matters.

United States Code Title 18 S 2314
18 S 3164
18 S 3161
18 S Rule 52 (b)
Eighth Amend.
Fifth Amend.
Fourteenth Amend.
Sixth Amend.

The Court did not have jurisdiction, Whaley's due process, equal protection under law have been left out by the Court throughout Whaley's brush with criminal justice. Capricious excessive bail, unlawful incarceration, no speedy trial, counsels ineffective assistance unlawful I.D. sighting procedure, preemptive exclusion by Court of controversy rightly heard by jury, purjured witnesses, Court issued unlawful subpoenas Court records falsy certified by reporter and clerk.

Non-jurisdiction, preemptive exclusions of material facts from jury deliberation, due process concerns left out by Court, deprived Whaley of Constitutional guaranteed rights and oppressed and injured Whaley in the free exercise of Civil Rights all wide departures from an accepted, usual course of judicial proceedings, all sanctioned by the Ninth Circuit Court of Appeals.

Issuance of subpoena to foreign nationals, the automatic exclusion of time by the Court without showing cause within the provisions of 18 S 3161 h 1 (F), denial of relief for accused within the provisions of 18 S 3164, are decisions which should be made by this Court. In light of Dowling, S.C. No. 84-5489, decided June 28, 1985, classification of "Vessel" as goods and merchandise and as Appeals Court cites merely one instance of conviction in like prosecution; abuse of discretion by District Court and how Whaley's was flagrantly prejudiced as set forth in an ineffective assistance of Counsel claim, are decisions Whaley believes are in conflict with applicable decisions of the High Court.

18 S 2314 "Whoever transports in interstate or foreign commerce any goods, wares, merchandise securities or money of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud."

18 S 3164 (a) "The trial or other disposition of cases involving-----
(1) a detained person who is being held in detention solely because he is awaiting trial.
(b) The trial of any person described in sub-section (a) (1) or (a) (2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161 (h) are excluded in computing the time limitation specified in this section.
(c) Failure to commence trial of a detainee as specified in sub-section (b) through no fault of the accused or his Counsel or failure to commence trial of a designated releases as specified in subsection (b), through no fault of the Attorney for the Government, shall result in the automatic, review by the Court of the conditions of release. No detainee as defined in sub-section (a) shall be held in custody pending trial after the expiration of such ninety day period required for the commencement of his trial."

18 S 3161

(a) "In any case involving a defendant charged with an offense the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the Counsel for the Defendant and the Attorney for the Government set the case for trial on a day certain or list it for trial on a weekly or other short term trial calendar at a place within the judicial district, so as to assure a speedy trial."

(c) (1) "In any case in which a plea of not guilty is entered the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment or from the date a defendant has appeared before a judicial officer of the Court in which such charge is pending, which ever date last occurs.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed or in computing the time within which the trial of any such offense must commence;

(1) Any period of delay resulting from other proceedings concerning the defendant including but not limited to---

(f) delay resulting from any pre trial motion from the filing of the motion through the conclusion of the hearing on, or, other prompt disposition of such motion;"

FIFTH AMENDMENT - "no person shall be deprived of life, liberty, or property, without due process of law."

SIXTH AMENDMENT - "his defense"

EIGHTH AMENDMENT - "excessive bail shall not be required"

FOURTEENTH AMENDMENT - "Sec. 1, no state shall deprive any persons of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

18 RULE 52(b) - "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT APRIL 25, 1986

UNITED STATES OF AMERICA,
Plaintiff-Appellee, No. 85-5026
v. DC No. CR-84-00600-01
DORIAN DOUGLAS WHALEY OPINION
Defendant-Appellant.

Before: WALLACE, HUG, and NORRIS, Circuit Judges.

HUG, Circuit Judge:

Appellant Dorian Whaley was convicted under 18 U.S.C. § 2314 for transporting a stolen trimaran from Coronado, California to Cedros Island, Mexico. He now appeals the conviction, arguing that (1) the indictment was invalid because a boat is not "goods, wares, (or) merchandise" for purposes of section 2314; (2) he did not receive a speedy trial as required by 18 U.S.C. § 3161; and (3) he was denied effective assistance of counsel. We affirm.

JUDGMENT AND COMMITMENT

United States District Court

FOR THE

SOUTHERN DISTRICT OF CALIFORNIA NOV. 21, 1984

00725

United States of America

v. No. 84-0600-G-Criminal

DORIAN DOUGLAS WHALEY (1)

IT IS ADJUDGED that the defendant upon his plea of not guilty and a jury verdict of guilty,
has been convicted of the offense of transportation of stolen goods, in violation of 18 USC 2314, as charged in the indictment in one count, and the Court having asked the defendent whether, he has anything to say why judgment should not be pronounced, and no, sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the maximum period of time authorized by law and for a study as prescribed in 18 USC 4205(d), the results of such study to be furnished this Court within (3) months or such additional time not exceeding three (3) months as the Court may grant, whereupon the sentence of imprisonment here imposed shall be subject to modification in accordance with 18 USC 4205(c)

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Earl B. Gilliam
United States
District Judge

JUDGMENT AND COMMITMENT (Rev.2-68) Cr. Form No. 25

United States District Court

FOR THE

SOUTHERN DISTRICT OF CALIFORNIA FEB. 20, 1985

United States of America No. 84-0600-G-Criminal

v. MODIFIED JUDGMENT

DORIAN DOUGLAS WHALEY (1) AND COMMITMENT

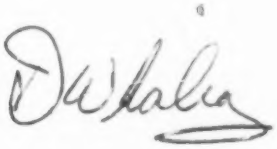
AND NOW on this 19th day of February, 1985, the Court having now received and considered the report of such study, and the defendant being present and with counsel, Stephen Hoffman,

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years and pursuant to 18 USC 4205(b)(2), the Court specifies that the defendant shall become eligible for parole at such time as may be determined by the United States parole Commission.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Earl B. Gilliam
United States
District Judge

A copy of petition on CERTIORARI was served the Solicitor General , Department of Justice, Washington, D. C. 20530.



UPON MY OATH BEFORE GOD PURSUANT TO S.C. RULE 19. 3., S.C. RULE 28 A COPY OF PETITION ON WRIT OF CERTIORARI WAS SERVED BY MAIL ON THE PERSON(s) LISTED BELOW:

- Judge Earl B. Gilliam
  U.S. Court House
  940 Front St.
  San Diego, Ca. 92101
- Judith Hayes, A.U.S.A.
  U.S. Court House Rm. 5N19
  940 Front St.
  San Diego, Ca. 92189
- Clerk
  Court of Appeals, Ninth Circuit
  7th & Mission Sts., P.O. Box 547
  San Francisco, Ca. 94101
- Reporter Thelma Strobel
  U.S. District Court Dept. 7
  940 Front St.
  San Diego, Ca. 92189
- Clerk Wm. W. Luddy, Deputy Clerk Gregory J. Medeiros
  U.S. District Court
  940 Front St.
  San Diego, Ca. 92189
- U.S. Attorneys Office, Appellate Division
  940 Front St.
  San Diego, Ca. 92101

Mailed June 24, 1986
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Atlantic City, New Jersey 08401

86-404

Appendix Supplement

Supreme Court, U.S.
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U.S. Supreme Court

October, 1985

CERTIORARI

D.D. Whaley Petitioner v U.S.A. Et Al Respondents

CRIMINAL TRIAL, CONVICTION, APPEAL ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION ON WRIT OF CERTIORARI

Dorian D. Whaley
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(609) 348-0977

Concerning the "market value" criterion for property subject of U.S.C. 18, section 2314; the issue was first raised by petitioner in the form of a motion for arrest of judgement pursuant to rule 34 of the criminal rules.

The issue was raised by petitioner in the District Court on November 15, 1984 the Court postponed hearing the matter until November 16, 1984 at which time the Court issued an opinion and denied petitioners motion.

> **Opinion**
> The Court with reference to value, time-honored rule of law that the owner of property may give evidence as to value. That's been recognized as being competent evidence subject to cross-examination and subject to the issue of credibility, but your property is entitled to make that declaration in court, and in this case, that was not refuted by any other evidence; and I must say that in addition, there were photographs, pictures of the boat. So, there's sufficient evident in the record to sustain the burden of prosecution of issuing the value of the goods for the purposes of the statute.
>
> R.T. 21-22

The issue was not raised again by counsel of petitioner in the Ninth Circuit Court.

Petitioner contends the Courts opinion was unlawful. U.S.C. 18, section 2311 defines value as "face, par, market." Close inspection of the Courts opinion will show the Court does not address the market value criterion at all.

Petitioner further contends the Court opinion is not congruent with other Courts opinion upon the matter.

In this Court petitioner relies on the following:

> U.S. v CHANDLER 586 F2d 593 (1978) p.602 [12]. The first paragraph of section 2314 makes it a Federal offense to transport in interstate commerce stolen property with a value of $5,000.00 or more. This jurisdictional minimum has frequently been held to be an essential element of the offense.

U.S. v DIOR 671 F2d 351 (1982) p.357 [8-9]
Proof that the value of the transported property was $5,000.00 or more is an essential element of a violation of 18 U.S.C. section 2314.

HERMAN v U.S. 289 F2d 362 (1961) p.366 [6-7]. "Mere cost of production, cot of replacement, value to the owner, value to one who might have used it under certain circumstances, whatever else it might be is not market value. For that value - MARKET - depends on a market, whether formal or informal, in which willing buyers bargain with willing sellers.

HERMAN v U.S. Supra p.366 [6-7]
The Standard test for determining market value of stolen property is the price a willing buyer would pay a willing seller at the time and place the property was stolen.

U.S. v MCCLAIN 545 F2d 988 p.1004 [23]
We now emphasize that the willing buyer-willing seller formula need not always be confined to the time and place of theft. 35
Instead as we have once before observed, value may be determined at any time during the receipt or concealment of stolen property.

U.S. v NALL 437 F2d 1177 (1971) p.1186 [8-
The question posed by this statute is not the "value" of the securities to the owner, as charge by the District Court, but rather "the face par of market value."
Congress plainly restricted value to three well understood standards.

To have prescribed actual or intrinsic value as a test would have been multiplied uncertainties in which worth would, or might be, fixed by undulating elusive factors of which personal sentimental attachment, collateral cost of production, unique value to a particular person are but typical.

> We also agree with the Seventh Circuits statement in a case which did not involve the present statute: "But the owners qualification to testify does not change the market value concept and permit him to substitute a (value to me) standard for the accepted rule, or to establish a value based entirely upon speculation U.S. SOWARDS 1966 370 F2d 87, p. 1187 [14]

Furthermore the owners totally uncorroborated testimony was completely irrelevant concerning "market value" as rule 104 (b) prescribes;

> RULE 104b
> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the Court shall admit it upon or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> Finally U.S. v JOHNSON 718 F2d 1317 p. 1320 "The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute their crime with which he is charged."

. . . . . .

Concerning the total, complete absence of evidence petitioner was at any time or place at all in posession of the alleged goods transported, it is a foregone conclusion possession is an essential, necessary element of transportation.

The issue was first raised by petitioner in the form of a motion for directed verdict for acquittal pursuant to rule 29 of criminal rules.

The issue was raised in the District Court on October 12, 1984. The court issued an option and denied petitioner motion.

OPINION

THE COURT: THE COURT WILL HAVE TO DENY THAT MOTION. I THINK THERE ARE CIRCUMSTANTIAL EVIDENCE THAT THE BOAT WAS MISSING, THE AUTOMOBILE, CONSIDER THE CAR IN RESPECT TO THE LICENSE NUMBER, AND ALSO THE METHOD OF THE CAR, THAT IS, THE INTERIOR BEING ALTERED WAS FOUND NEAR THE AREA, ABANDONED NEAR THE AREA WHERE THE BOAT WAS TAKEN FROM, AND THEN WE HAVE THE BOAT IN THE AREA WHERE IT WAS ULTIMATELY FOUND, AND WE HAVE MR. WHALEY IN THAT AREA, ALSO.

THE CIRCUMSTANTIAL EVIDENCE CASE — THERE'S ONE PIECE OF EVIDENCE, DIRECT EVIDENCE WHERE HE TAKES — OF COURSE, THE JURY CAN ALWAYS DETERMINE CREDIBILITY, OR DECIDE NOT TO BELIEVE THAT, WHERE HE'S TAKEN BACK TO THE BOAT AS SHOWN BY ONE OF THE WITNESSES. SO THERE IS SUFFICIENT EVIDENCE THERE BEFORE THE COURT TO GET PAST THE 29 MOTION.

THE COURT WILL DENY THAT MOTION AND RULE THERE'S ENOUGH EVIDENCE TO GO TO THE JURY IN LIGHT OF THE STATUS OF THE CASE AT THIS TIME.

R.T.211-212

The issue was not raised again by counsel of petitioner in the Ninth Circuit Court.

Petitioner contends the Courts opinion is not congruent with opinions of other Courts, lacks any ethical, reasonable support and deprived petitioner of equal protection and due process of law.

In this Court petitioner relies on the following:

USSC Digest Vol 11 A p.17 section 5
b. There is no word both in common speech and legal terminology more ambiguous in its meaning than "possession;" . . . NAT. SAFE DEPOSIT CO. v STEAD 232, U.S. 58, 34 S. CT. 58 L. Ed. 504

U.S. v STRICKLAND 205 F SUPP 229 p.301 [6]
The Sixth Circuit has defined possession in fact as such actual, exclusive control as the nature of the thing admits PEARSON v U.S. Supra 192 F2d at 692

U.S. v PRUJANSKY 415 F. 2d 1045 p. 1049 [6]
What is constructive possession? A person not being in actual possession but having the right to exercise dominion and control over a thing is deemed to be in constructive possession. The mere presence at the situs of property does not constitute possession; that is a person innocently at the situs of a property does not mean that he is in possession of it.

ROGERS v U.S. 416 F.2d 926 (10 cir) p.927 [1]
Proof that an accused is in possession of a vehicle recently stolen in another state sustains the inference that he knew the vehicle was stolen and that he transported it in interstate commerce. The basis of the inference is the possession of the vehicle. Absent possession no inference may be drawn.

U.S. v. CASEY 428 F.2d 229 p. 231 [3]
as stated in FITZPATRICK v U.S. 410 F.2d 513,14(5 cir 69)

"Because unexplained possession of a recently stolen vehicle permits substantial inference which may help prove two essential elements of the government case, the evidence relied on as proof of possession must be scrutinized with great care to prevent injustice . . . A mere suspicion of possession will not support the inferences of transportation and guilty knowledge."

U.S. v ROBERTSON 417 F2d 873 p.876
[2]
The inference allowed by unexplained possession is a powerful one. It is a substitute for direct proof of guilty knowledge and the Courts, both trial and appellate, should proceed with extreme care in determining whether the evidence sufficiently establishes a basis for the inference. Cautious vigilance must be maintained against the employment of a naked legal principle in a factual setting which provides no reasonable basis for the principles application.

U.S. v STRICKLAND 205 F. supp 299-p.301 [3]
However in the absence of actual and exclusive possession of stolen property or in the absence of other circumstances shown from which the jury without any consideration being given to the implied possession, could properly infer that the Defendant had guilty knowledge "there is insufficient evidence with which to convict. U.S. v RUSSO (C.A.3) 123 F.2d 420-22. In other words constructive possession or implied possession standing alone is not suffient to support an inference that the constructive possessor knew that the goods had been stolen U.S. v RUSSO Supia at

422 SORENSON v U.S. (C.A. 8), 168 F 785-98-9 p.300 Defendant argues that this would allow the jury to pyramid inferences to establish the ultimate fact of possession with guilty knowledge, which the law does not permit.

U.S. v KEARSE 444F.2d 62 p.64[1]
"Presence tells nothing about what the Defendants specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession . . . "
U.S. v ROMANO 382-41, 86 S. CT. 279-82 15 L.Ed. 2d 210
Presence is relevant and admissable evidence in a trial on a posession charge; but absent some showing of the Defendants function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt "the inference of the one from proof of the other is arbitrary . . ." TOT v U.S. 319 U.S. 463067, 87 L. Ed. 1519-24, 63 S. Ct. 1241. The United States has presented no cases in the Courts which has sustained a conviction for possession based solely on the evidence of presence. All of the cases which deal with this issue and with which we are familiar have held presence alone unilluminated by other facts to be insufficient proof of possession.

U.S. v ABIGANDO 439 F.2d 827 p.834 [12-13]
Abigando contends that the instructions in effect assumed possession because they set out the permissable inferences from possession without defining the term. To have done so would be error since this would remove from the jury the issue of whether or not the vehicles were ever possessed by Abigando.

Furthermore, testimony of the witness concerning petitioners presence at the location of the vessel was totally, completely uncorroborated and as such irrelevant as prescribed by rule 104 (b). The same witness committed purjury procribed by u.s.c. 18 section 1623 (c)

> PATTERSON v N.Y. 432 U.S. 197, 53 L.Ed. 2d 281, 97 S. Ct. 2319
> "The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

. . . . . .

Concerning the issue raised by petitioner "vessel" is not subject of U.S.C. 18 section 2314 therefor petitioner was falsely indicted and unlawfully tried.

Throughout District Court and Appeal Court proceedings petitioner has pressed this issue.

The fact remains throughout all proceedings the United States has not plainly demonstrated "vessel" is subject of the Criminal Statute, neither has the United States plainly demonstrated any Court at any time has determined same.

The issue was first raised by petitioner in the District Court, July 6, 1984, hearing on the matter was postponed until August 6, 1984, hearing was agained postponed until August 27, 1984 at which time issue was denied without hearing. All on record Court file and Reporters Transcript.

The issue was again raised by petitioner in District Court on October 3, 1984 in the form of a motion to dismiss indictment at which time the Court gave an opinion and denied petitioners motion.

Petitioner ordered a transcript including the District Court opinion upon the matter but was not provided such which violates petitioners Civil Rights.

However, petitioners remembrance of the Courts opinion is;

OPINION

The Court: Vessel is subject of commerce and is chattels and as such is goods and merchandise.

Slight reflection will disclose the Court did not deem to employ the law as basis of opinion nor did the Court cite authority of any other Court which has determined "vessel" subject of the Criminal Statute.

Petitioner raised the issue in which the Ninth Circuit Court which gave an opinion upon the matter and affirmed the District Court proceeding.

OPINION
THE COURT

> In enacting section 2314, Congress intended to extend the National Motor Vehicle Theft Act to cover all stolen property over a certain value which is knowingly transported across state or international boundaries. See United States v. Taylor, 178 F. Supp 352, 353-55 (E.D. Wis. 1959).Courts have given effect to this broad congressional intent by interpreting "goods, wares, [or] merchandise" as "a general and comprehensive designation of such personal property or chattels as are ordinarily a subject of commerce" United States v. Seagraves, 265 F. 2d 876 880 (ed Cir.1949); UNITED STATES v. Greenwald, 479 F. 2d 320, 322 (6th Cir.), cert. denied, 414 U.S. 854 (1973). More specifically, the Fifth Circuit has upheld a conviction under section 2314 for transportation of stolen sailboat. United States v. Celcer, 500 F. 2d 345 (5th Cir. 1974), cert. denied, 421 U.S. 911 (1975). We agree that a boat or trimaran is "goods, wares, [or] merchandise: for purposes of section 2314 and thus find Whaley's indictment valid. 1/
>
> . . . . . .

Close examination of the Courts opinion will disclose the Court employed subterfuge as none of the citations given as basis for opinion save one, U.S. v Celcer, had vessel at issue and outright deceit as the Court in Celcer never reached the specific issue petitioner has raised. In Celcer conviction was had without the defendant raising objection upon the subject.

These tactics of the Courts are a disgrace and may be subject of Criminal liability.

Petitioner contends this activity is unlawful as petitioner was deprived of equal protection and due process of law. In this Court petitioner relies on the following:

> LETTER FROM: Thomas Jefferson 3rd President of the U.S. to Samuel Kercheval, July 12, 1816 (Third paragraph) "THE JURIES OUR JUDGES OF ALL FACT AND OF LAW WHEN THEY CHOOSE IT.
>
> U.S. v. JOHNSON 718 F2d 1317 (1983)
> More than that, this being a criminal case . . . no fact, not even a undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue even the most patent truths. In our Federal system, the trial Court may never instruct a verdict either in whole or in part. And yet, that is substantially what the trial Judge did here on the crucial issue of whether these were investment contract. He instructed them flatly and without equivication that they were.
>
> U.S. v. JOHNSON Supra III p. 1321
> There is no catagorical distinction between "legal" and "factual" questions, for in every case application of a legal principle turns on the presence of a particular fact.
>
> U.S. v. JOHNSON Supra p.1322
> In the First jury trial in the United States Supreme Court, Chief Justice Jay — reminded the jurors, you have never the less a right to take upon yourselves to judge of both and to determine the law as well as the fact in controversy.

U.S. v. JOHNSON Supra V [2-4] p. 1325
The jury's function is "the independant determination of facts, and the application of the law . . . to the facts . . ."
Therefore, the jury's charge should be a statement of the parties claims, the issues of fact the jury must decide and the applicable law . . .

U.S. v. JOHNSON IV p. 1322
And the fundamental and "elementary" principles involved in this case are that the government must prove every element of the crime beyond a reasonable doubt and that, in criminal cases, the Court simply may not direct a verdict on any issue.

PATTERSON v N.Y. 432 U.S. 197, 53 L. Ed. 2d 281 97 S. Ct. 2319 (1977)
The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged 397 U.S. at 364 24 L. Ed. 2d 368, 90 S. Ct. 1068 510 Ohio Ops 2d 323. The only facts necessary to constitute a crime is said to be those that appear on the face of the statute as part of the definition of the crime. (3)

The Court holds that the prosecution must prove beyond a reasonable doubt "all of the elements included in the definition of the offense of which the defendant is charges." Ante at 210 53 L. Ed. 2d 292 (emphasis added)

U.S. NATIONAL DAIRY PRODUCTS CORP. 372 U.S. v 29 9 L. Ed. 2d 561 83 S. Ct. 594 p. 566 [8]. This is not to say that a bead sight indictment can correct a blunderbuss statute for the latter itself must be sufficiently focused to forwarn of both its reach and coverage.

It is perfectly proper and in fact mandated that the District Court dismiss an indictment if the indictment fails to alledge facts which constitute a prosecutable offense.

DOWLING S.C. No, 84-589 decided June 28, 1985. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals: and on the plain principle that the power of punishment is vested in the legislation, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." United States v, Wiltberger, 5 Wheat. 76, 95 (1820) "And when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable understandings." Williams v. United States 458 U.S. at 286
Here, the language of section 2314 does not "plainly and unmistakably" cover petitioner Dowling's conduct United States v. Lacher. 134 U.S. 624, 628 (1890)
In sum, Congress has not spoken with the requisite clarity. Invoking the "time-honored interpretive guideline" that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Liparota v. United States
(1985) (slip op. 8) quoting Rewis v United States, 401 U.S. 808, 812 (1971), we reverse the judgment of the Court of Appeals.

RICKS v. D.C. 414 F2d 1097
Thus "a statute which either forbids or requires doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Moreover, definitional un-

certanty is an open invitation, if indeed not unrestrained administration. "[A] law fails to meet the requirements of the Due Process Clause" not only "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits," but also if it "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." And legislation of that character "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat."

LANZETTA v. N.J. 306 U.S. 451 at 453
It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U.S. 359, 368, 75 L. ed. 1117, 1122 51 S. Ct. 532 73 A.L.R. 1484: Lovell v. Griffin, 303 U.S. 444, 821. 3d. 949, 58 S. Ct. 666. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The Applicable rule is stated in Connally v. General Constr. Co. 269 U.S., 385, 391, 70 L. ed. 322, 328, 46 S. Ct. 126: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalities, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violated the first essential of due process of law.

. . . . . .

Concerning unlawful deprival by District Court of petitioners Statutory, Constitutional right to a speedy trial.

The issue was first raised by petitioner in the District Court, October 4, 1984, in the form of notice to the Court, Statutory 70 day limit of petitioner to trail had lapsed. The Court made a denial and gave a brief opinion.

OPINION

The Court: I would be inclined to deny that because there's counsel involved in the case. You may want to renew that. If you come up with something more definite, you can have a conference with Miss Hayes and with the Court. You may want to review that.

R.T. 32

Petitioner raised the issue again in the District Court, October 10, 1984, in the form of a motion to dismiss.

Motion was denied and the Court gave opinion setting forth so called findings.

OPINION

The Court: Okay. In looking at the United vs. Perez Reveles Case, which is relied on to a extent by the Defendant, it does stand for the proposition that no continuance by the Court be excludable unless the Court states either or in writing the reasons for the granting of continuance. However, there is an essential difference in that case from the one here at bar. In the Perez Reveles case there were no pending, and there the continuance was the continuance of the trial. The District Court two such continuances at the request of Counsel.

In looking at 18 U.S. Code section 3161 (H) (F), which provides for excludable time for resulting from pre-trial motion, from the filing of the motion through the conclusion of the hearing or other prompt disposition of such motion, the section provides for the excludable time in filing through hearing with no specific requirement as to when such a motion must be heard.

Now, this section must be read in conjunction with 3161 (H) (1) (J), which provides for excludable time for the delay reasonably attributable to this period not to exceed 30 days during which this proceeding concerning the Defendant is actually under advisement by the Court.

Bear in mind that even assuming the pendency of the Defendant's motion to dismiss was not excludable under 3161 (H) (1) (F), it would be excludable time under (H) (1) (J), the reason being the Government filed its opposition on August 6th, and keep in mind that the Defendant here filed his motion late and without order shortening time at that time. So I think the Court, it's proper to rule that it could not rule on that motion on that date.

However, the Court did rule on September 4, 1984 and I find at this time this period would be excludable under (H) (1) (J) or (H) (1) (F).

In addition to those reasons, when the Defendant filed speedy trial motion, and that was first orally heard on August 27, 1984, and that was because he had sent his handwritten motions to his Counsel, that also started and excludable period, which I didn't rule on that motion until September 4, 1984.

I think the Court should also comment that many of the problems that we find ourselves in in this particular case are really because of the Defendant's own making. One, we have him discharging his attorneys, then the filing of his motions with the Court with delays caused by or due to his sending these motions on to whatever Counsel is representing him at that particular moment.

The period between the filing of a motion and its determination by the Court is excludable under 18 U.S.C. 3161 (H) (1) (F), and I refer to Furlow vs. U.S., which is a Ninth Circuit case, 1981, 644 FED.2d 764.

The Court would deny the motion to dismiss, and I think it would be proper at this time to make some findings for you, and I'll make the findings for future reference, whatever the necessity or need may be, and they're consistent with those that the Government submits.

First, I find, number one, that the Defendant's motion to dismiss for failure to state a cause of action was pending from its filing date on August 2, 1984 — The motion hearing on September 4, 1984, which was submitted to Court.

Ms. Hayes: That would be September 4th, Your Honor? I'm afraid there may be a typographical error.

The Court: September 4th.

Secondly, that the Court considers both Defendant's written motion and the Government's written responses in deciding that motion on September 4th.

Thirdly, that the speedy trial motion was pending from the time it was received by the Court on or about August 27th, the motion hearing date of September 4th.

Fourthly, that the Court considers the Defendant's request for new counsel on August 27th, and in the interest of Justice continued the hearing on the motion from August 27th to September 4th to allow new Counsel to be obtained, and to permit that new Counsel to prepare any additional argument or whatever else would be necessary for him in representing the Defendant in support of the pending motion.

Fifth, that the Government's reciprocal discovery and notice of alibi, or standing motion was pending from the filing on September 27, 1984. October 3, 1984.

> Lastly, that the Defendant's motion to dismiss pursuant to the speedy trial act has been pending since it was filed October 1, 1984 to the present.
>
> . . . . . .

The Court opinion and so called findings are 16 paragraphs in all, petitioner invites comparision in retort.

Court observes Perez Reveles which focuses on mandatory injunction to state orally or in writing reasons for granting continuance but never addresses wherefor differences referred to alleviate the prescription.

Instead Court changes the subject and proceeds to elaborate upon U.S.C. 18 section 3161 h (1) (F) and determines aside from the prescription of the section, there are no specific requirements when such a motion must be heard. This determination leaves the door wide open for unlimited evasion of an issue by the Court.

h (1) (F) permits exclusion of periods of delay in only one circumstance to wit: any delay resulting from any pretrial motion.

It is true a time for hearing is not specified but delay must result from the motion is made plain.

No delay resulting from the motion was or has ever been shown. The District Courts attempts to create an expansive interpretation of the section, ignores the law, frustrates the equal administration of Justice, and in the instant matter is nowise germain.

Court expresses ambiguity concerning application of Section h (1) (F) and determines h (1) (J) would apply, withall, citing filing times of the partys 25 grounds for the determination. However filing time has nothing to do with the provisions of h (1) (J).

h (1) (J) permits exclusion of delay in only one circumstance to wit: any period during which any proceeding concerning the Defendant is actually under advisement by the Court. Court did not report any reason or cite any information expected which would warrant advisement. Withall, the only thing considered by the Courts own admission, were original papers of the partys filed in the first instance and nothing else at all.

The issue was denied without hearing after two successive delays caused by Court and prosecution. Petitioner has elaborated why the Courts reliance upon Sections cited are unfounded.

Petitioner did not file a speedy trial motion as reported by Court but filed a notice of demand for speedy trial as required by law and authority. Said matter was never heard or addressed by the Court at the time cited. Whether or not Petitioner sent motion to Counsel is not germain to any of the Statute provisions.

Discharge of attorney is not germain to any of the Statutues provision nor again is whether or not Petitioner sent motion to Counsel.

Court returns to H (1) (F) the period is excludable in only circumstance to wit: delay resulted from the motion. No factors, nothing engendered by the motion has ever been cited District or Circuit Court as cause of delay.

Court sides with the government.

Court postponed hearing August 6, 1984, first scheduled hearing date, without reason, rescheduled hearing to August 27, 1984, which hearing was again postponed, rescheduled to Sept. 4, 1984 at which time motion was denied without hearing.

Admission by Court the parties original papers in the first instance were the only matters considered which precludes employment of H (1) (J).

Again the matter was merely a notice of demand for speedy trial.

Petitioner never made a request for Counsel and did not seek Counsel. Court imposed unwanted Counsel upon Petitioner. Petitioner did not seek continuity of Counsel. Ultimately Counsel imposed by Court upon Petitioner did not take any time to prepare merely proceeded with Petitioners motion without introducing any changes. It must be established Counsel was competent to exercise due diligence. Petitioner never sought time for preparation.

The content of the motion and citations therein placed absolutely no burden upon Petitioner to respond unless the conditions of the citation were met or Petitioner intended to meet said conditions. None of which was the case. The motion was entirely bogus akin to filibuster taken to obstruct the normal, orderly equal administration of justice. There is no delay incident to this motion which may be excluded within the provisions of U.S.C. Title 18 section 3161. The motion was never heard and did not in any way delay trial as had been scheduled.

No delay resulting from Petitioners motion to dismiss has ever been cited by the Court hence the period is not excludable.

So ends Petitioners retort.

Petitioner draws the conclusion the Courts, for some strange reason, unintelligible to Petitioner, have made pendancy of a motion equal in all respects to delay resulting from a motion. The law is plain and does not bear out this equation. What is the meaning of this.

Petitioner raised the issue again in the Ninth Circuit Court of appeals which gave an opinion and affirmed the District Court proceedings.

OPINION

Whaley next contends that the District Court improperly excluded time in computing the seventy-day period established by the Speedy Act, 18 U.S.C. section 3161. He argues that none of the ninety-eight days between his arraignment on July 6, and his trial on October 11, 1984 should have been excluded because the District Court did not meet the standards set forth in

> Section 3161 (h) (8) (A) "ends of justice" exclusion, which require that the Court specifically set forth the reasons for its actions. However, the Speedy Trial Act also provides that "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" "shall be excluded" from the seventy-day period. 18 U.S.C. section 3161 (h) (1) (F) (emphasis added). We find that the time attributable to pending motions is properly excludable. Here, at least forty-three days may be attributed to Whaley's motions to dismiss (August 2 - September 4; October 1 - 10; when these are subtracted from the ninety-eight days between Whaley's arraignment and trial, only forty-five days are counted toward the seventy-day period. Thus, Whaley was tried within the time frames set by Section 3161.

Paragraph 2, sentence 3 of the Ninth Circuit opinion reports, and is the basis of affirmation, "time attributable to pending motions is properly excludable."

Petitioner contends without any showing delay resulted from the motion, pendancy of a motion without more does not satisfy the prescription of the section cited.

In addition to these unlawful actions . . . The complaint warrant upon which Petitioner was arrested was not legitimate and should have been dismissed by the Court in the equal administration of Justice in accordance with law U.S.C. Title 18 section 3162 Sanctions.

Petitioner was arrested, arraigned, waived extradition from District of Hawaii, June 20, 1984, was transported rearraigned in South District California, July 6, 1984. 17 seventeen days had elapsed. No one had addressed the delay beyond 10 days specified by law. U.S.C. Title 18 section 3161 (a).

Court denied Petitioner relief prescribed by U.S.C. Title 18 section 3164. Section 3164 prescribes automatic review of conditions of release by Court. None was granted.

Time specified by law for automatic review having lapsed Petitioner notified District Court on September 15, 1984 in a hand written document, addressed directly to Judge, Earl B. Gilliam, Court had unlawfully denied Petitioners right prescribed by law. Petitioner never received acknowledgment of notice by Court. Petitioner has a copy of this notice.

No acknowledgement from District Court Petitioner notified Judge Clifford Wallace Ninth Circuit Appeal Court concerning illegal detention and redress on September 27, 1984. Clerk of Appeal Court informed Petitioner on October 17, 1984, "it is inappropriate to write directly to a judge of the Court. Petitioner has a copy of this notice and reply to Clerk.

On October 3, 1984, Petitioner appeared in Court for scheduled hearing of other matters at close of hearing when Court did not demonstrate any intent to address Petitioners automatic review, Petitioner raised the issue with Court. Court postponed hearing the matter until October 4, 1984, at which time Court had hearing and gave opinion.

HEARING

Mr. Squibb: The motion that is on calendar this morning is at the Defendant's request. It would be our desire to, in the interest of creating a complete record with respect to the pretrial issue, have a ruling from the Court on the applicability of 3164 to the case at this time. That Statute seems to indicate that a person who's held in custody for over 90 days is entitled to a review of bail conditions, and potential release if that 90 day period is passed.

The Court: Do you want to tell us why you feel we should release him? Do you have good grounds for that?

Mr. Whaley, you may speak if you like.

Mr. Squibb: The Statutue itself, Your Honor, would be what we're relying upon.

Mr. Squibb: I think the wording of the Statute, Your Honor, is that if the person is held in custody over 90 days, there's a review of conditions of release, and the Statute goes on to say that no one shall be kept in custody for that 90 day period.

The Court: Well, the words, "no one shall be kept in custody: is not mandatory that the Court rule that way. That's not the way the court interprets it.

We look at the overall picture to determine whether or not the Defendant should be granted bail, and what his bail should be. Of course, we're concerned with whether or not he's a danger if he's out, and those are some of the considerations.
RT 21-22

The foregoing is partial opinion of the Court the sum resulting in denial of release of Petitioner from custody. Court reporter has neglected to include parts of transcript covering these matters.

There is no evidence the Court had any knowledge of the Statute or so much as inspected the provisions of the Statute pertinent to Petitioners circumstances.

In this Court Petitioner relys on the ordinary plain meaning of the law as prescribed U.S.C. Title 18 section 3164.

U.S. v TIRRASSAO 532 F2d 1298 p. 1299 [1], [2]

Day certain of trial was reset by and upon motion of the Court.

Government admitted unpreparedness for trial within statutory limits.

NUN PRO TUNC determination concerning excludable time by Court Proof of the foregoing allegations will be found in the Court file and transcript of District Court proceeding. Petitioner is prepared to elaborate upon all allegations deemed necessary by the Court.

In this Court Petitioner relies on the ordinary plain, straight forward meaning of the law as prescribed

U.S.C. Title 18 section 3161
U.S.C. Title 18 section 3162
U.S.C. Title 18 section 3164

. . . . . .

Concerning further denial, due process. Unlawful subpoena, unlawful I.D. confrontation.

District Court hearing Nov. 16, 1984 and:

OPINION

Ms. Hayes: Yes, Your Honor.

There were two questions brought up by Mr. Whaley or two suspicions that I think can be set to rest in favorable, direct style.

The witnesses were subpoeneaed, even though the subpoena power does not extend to Mexico. Subpoenas were issued and they were delivered to the witnesses. In fact, two sets of subpoenas were drafted to make sure that their subpoenas actually reached those witnesses in the remote area of Mexico where they live.

The Court: There's no real problem having witnesses here.

Mr. Whaley: I'm just wondering where the Court come by the power to subpoena foreign nationals. That's my —

The Court: I don't have the power to subpoena foreign nationals, but I can autorize — and we normally do if your consel has witnesses there they want to bring up. I can say would you try to get them here, and under federal rules, we do have the power to send them out to depose them. We don't have the power to order them to appear. If they want to come and the Court's willing to pay for it or the U.S. Attorney is willing to pay for it they can come.

Mr. Whaley: Did this Court issue a subpoena:

The Court: Yes, but issuance of a subpoena is an administration function. It's not something that I look over every act. In other words, if you ask me did I know or whether or not the U.S. Attorney subpoenaed them, I will tell you no because it's an administrative act done by the Clerk of the Court. It's so

fundamental that no one ever worries about it. If you want to subpoena a witness, just go on down to the Clerk's office.

Mr. Whaley: Thank you

RT 20,21,24,25

EXHIBIT

Investigadores Privados
SUNSET
San Angel No. 198 Fracc. Reynoso Tel. 81-15-15 La Mesa Tijuana, B. Cfa.

Sept. 10, 1984
Tijuana B. C. Mexico

Subject - Serve Subpoenas to Witnesses, Dorian Whaley case.

Sept. 10th I received four subpoenas from F.B.I. receptionist and September 16th flew to Guererro Negro, Baja Calif. Mexico. Landed, rented taxie, tried to locate subjects. Mexican holiday and so there was no one to be found. Went to hotel and next morning went to immigration office and found Mario Games. He agreed to come with me on trial date, Oct. 10th. and to be a witness. From there I went to Port Capt. office and talked to both the Capt. and his helper. Fernando Lopez and Juan Zavala. I did give them their subpoenas and talked to them. Neither of them want to come and said they would be unable to I.D. Subject Whaley and they had no passport to cross boarder. They said they would go if they could obtain permission from Mexico City by that time. Located on his job, Jesus L. Florez. He is also agreeable and will come to the trial. Talking to him I met another man, Jorge Lerre who said he was the first person to have contact with subject when he walked into his came, very hungry and thirsty with the dog still wet from the swim. He said because he spoke no English he fed mand and gae him water but then turned subject to and Engineer named Ernesto Davila who spoke some English. Davilla was not in town at the time I was there. I came back and called Judith Hayes. She said go back and obtain as wittnesses these persons also.

3:15 P.M., October 10, 1984

(Recess)

The Clerk: No. 2 on calendar, criminal case No. 84-0600-G, United States of America vs. Dorian Douglas Whaley for jury trial.

The Court: The record will indicate that all parties are present, including the Defendant and his Counsel and the U.S. Attorney.

The problems we are having in getting a jury here — we do have some jurors, but Judge Nielsen promised them they could go at three o'clock. I won't be able to get any more jurors so we'll have to trail the jury until tomorrow morning at nine o'clock, and call the jury up at that time.

Do you have some witnesses here?

Ms. Hayes: Yes, we have present in Court, in addition to Mr. Millar, who is the victim in this case, we have Mr. Mario Games, Mr. Refugio Davila, and Mr. Jorge Leree and Mr. Flores, all are present from Mexico.

The Court: I wonder if they could be here tomorrow morning. We should be through with them tomorrow morning.

Ms. Hayes: Can we ask to start early tomorrow morning, if that's possible with the Court?

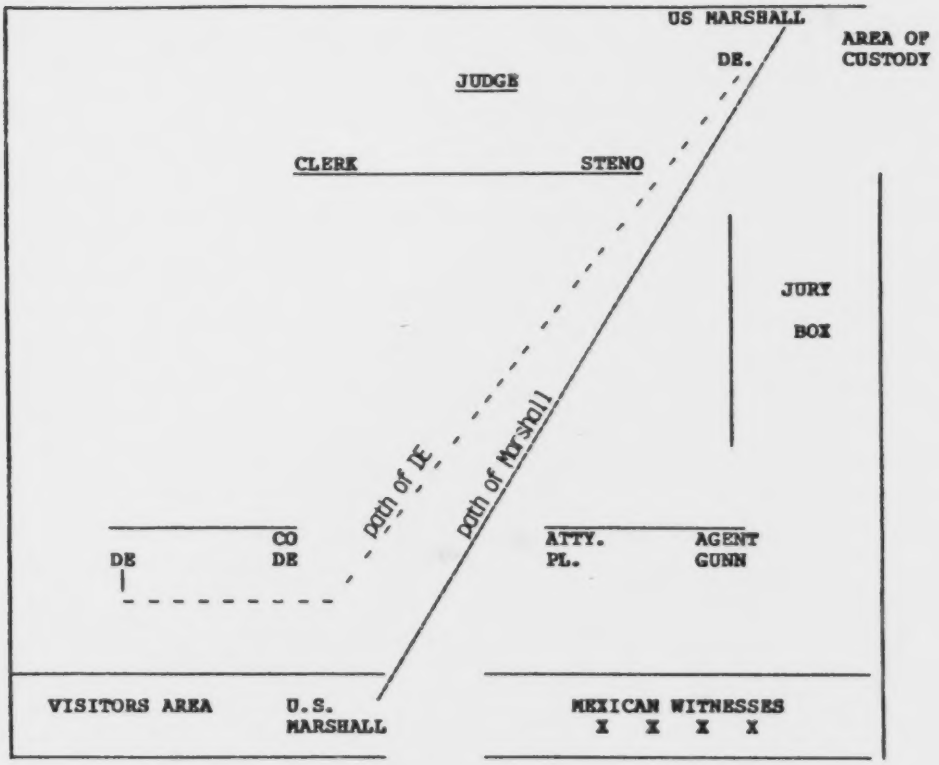
The Court: The problem is getting the jury selected. I'm willing to go. The problem is getting the jurors here. We'll reconvene at 8:30 tomorrow morning. The jury can be here at 8″45. We'll reconvene at 8″30 tomorrow morning.

(adjournment)

. . . . . .

Original

PHYSICAL CONDITIONS OF CT. AND NO. PERSONS PRESENT 10/10/84 3:15 P.M.



Due to the manifestly evident highly suggestive conditions and clearly unnecessary procedure, their was mistaken identity. The Defendant was denied due process and equal protection of the law. F.R.C.P. Rule 12.1 (b) in no event less than ten days before trial, unless the Court otherwise directs, the attorney for the Government shall serve upon the Defendant or his attorney for the Government the names and addresses of the witnesses upon whom the Government intends to rely to establish the Defendants presence at the alledged offense . . . which rule was not complied with by the attorney for the Government.

> District Court hearing November 16, 1984, Motion for new trial denied.
>
> Ms. Hayes: As to the other point argued by Mr. Whaley, I think we have addressed those points before. I would note for the Court that the witnesses testified that the man who gave them identification was the man who came from the boat. The identification was photo identification of the Defendant. There was no evidence to refute that testimony. So that even if we discount the identification, it was enough evidence to convict and submit on that basis, along with other arguments.
>
> RT 21
>
> At time of this recess Whaley had been continually incarcerated for 114 days.
>
> In this Court Whaley relies on the following:
> FEDERAL STATUTE prescribing subpoena
> Silverthorne Lumber Co. v U.S. 251 U.S. 385 at 392
> The essence of provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that is shall not be used at all. Of course this does not mean that the facts thus obtained become sacred

and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.

Mason v U.S. 414 F2d p. 1181
"Wade invisions not only that Counsel may detect unfairness but also that he may actively participate in minimizing the risks of misidentification."

Geralds v Deegan 292 F Supp 968 p.790
The identification at trial in his case was so infected with an unfair pretrial confrontation for identification that he was denied due process. This is a recognized ground of attack independent of the claim of the right to Counsel.

U.S. v Gidley 527 F2d 1345 p. 1352 [13 - 14]
In view of the serious consequences of misidentification for the Government not to make every effort to minimize gratuitously suggestive procedures is inexcusable.

Rudd v Fla. 343 F Supp 223 p. 222 [15]
Absent compelling circumstances, it would appear to be a denial of due process when a single suspect is presented to a witness. Lt. Vrume v Beto 383 F3d 36. The common fault with all such confrontations is the singling out process by the police which is ipso facto highly suggestive. This situation posed the implicit but obvious question: Isn't this man guilty.

Rudd Supia p. 221 [15]
Whatever may be said of lineups showing a suspect singly to a victim (witness) is pregnant with prejudice, The message is clear: The police suspect this man. That carries a powerful suggestive thought. Biggers v Tenn. 390 U.S. 440 88 S. Ct.

Sanchell v Parrat, 530 F2d 286 p.294 [10]
We have previously warned that showing only a single suspect to the witnesses is the most suggestive and therefore the most objectionable method of pre-trial identification.

Dixon v Hooper 407 F Supp 58 p. 66 [8-9]
Further once the accused was in custody no reason and clearly no exignet circumstances, existed for utilizing a one man procedure rather than a lineup.

Neil v Biggers 409 U.S. 188 34 LEd 401 98 S. Ct. 375 [9]
In Stovall v Denno 388 U.S. 293, 18 LGd 2d S. Ct., The Court held that the Defendant could claim that the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process.

Harden v Follette 333 F. Supp 371 p. 377 [8]
A show up can be saved only if the totality of the circumstances surrounding the confrontation outweighs its prejudicial effect.

Neil v Biggers Supra [11-13]
It is first of all apparant that the primary evil to be avoided is a very substantial likelihood of misidentification. It is the likelihood of misidentification which violates a Defendants due process.

Mason v U.S. Supra p.1180
The Wade Court was expressly concerned with unintentional as well as deliberate unfairness . . . risks — derive from the dangers inherent in the context of pre-trial identification. These dangers may result from such diverse influences as the witnesses desire to cooperate — from his knowledge he's expected to identify someone he sees — from suggestions subtely planted by the conduct or demeanor of a nearby policeman — and of course grouping which makes the Defendant conspicuous or unique.

Palmer v Peyton 359 F2d 199 p. 201 5th para
When the identifier is presented with no alternative choices: there is then a strong predisposition to overcome doubt and to fasten guilt upon the lone suspect.

The opportunity for suggestion inherent in the procedure used to secure this identification is manifest.

Rudd v Aa Supra p. 220 [11-12]
Any identification procedure by two or more witnesses in the presence of each other is fraught with dangers of suggestion U.S. v Wade/Gilbert v California

Therefore any identification by one could not otherwise but color the judgement of the other.

U.S. v Russell 532 F2d 1063 p. 1067 [1]
The applicable due process doctrine requires us to consider whether the Government, procedures were suggestive, whether they were necessary and whether the procedure produced a substantial likelihood of misidentification.

Neil v Biggars Supra [11-13]
It is the likelihood of misidentification which violates a Defendants right to due process.

Twitty v Smith 6144 F2d 325 p. 333 [5]
The purpose of Wade hearing is to determine dhors the trial whether pre-trial identification procedures have been so improperly suggestive as to taint an in Court identification.

U.S. V Wright 404 F2d 1256 p. 1262
"The Thrust of Stovall is that without justifying circumstances of a one man showup is to unnecessarily suggestive to satisfy due process: (same page) "Since mistaken identifications are probably the greatest cause of

erroneous convictions (1) (see U.S. v Wade 388 U.S. 218) we must require the fairest identification procedures under the circumstances with the stakes so high Due Process does not permit record best"

Mason v U.S. Supra [2]
We hold that there is no exception to the Wade rule for confrontations which occur at preliminary hearings.

Rudd v Fla Supra p. 217 [5-6]
The Wade decision requires that Courts apply the Wong Sun test which provides;
Whether granting establishment of primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality of instead to be purged of the primary taint.
Wong Sun v U.S. 371 U.S. 471 488 83 S. Ct. 407 b 9 LEd 2d 414

. . . . . .

Concerning ineffective Counsel

Mr. Squibb did not exercise Petitioner's right to take open direct exception with jury upon Courts instruction concerning possession, nor the unjust witness confrontation and unlawful status of witnesses, illegal aliens.

Allowed submission of uncertified documentary evidence incriminating Petitioner to jurys inspection.

Did not caution jury concerning exclusive "Market Value" criterion concerning goods, and witnesses irrelevant testimony upon the establishment of the value.

Richard Gonzales witnessed Mr. Squibb attempt to coerce Petitioner to withdraw from action pursuant to U.S.C. Title 18 section 3164.

Mr. Squibb had a notorious toxic dependancy.

Mr. Squibb was not qualified to practice in District Court.

October 10, 1984

Hearing District Court

Mr. Squibb: First of all Your Honor, I would like to state for the record that I disavowed the Defendant's comments regarding the alleged bias of the Court. I'm not sure of that.

I have attempted during the course of representing Mr. Whaley to amplafy and present points of law that I thought deserved further consideration of the Court. We've had our differences in how to present those issues, mostly in the application of 3164.

I've done my best to supply additional points and authorities to the Court on these issues.

At this point — I think it's a very difficult situation for me, obviously. I think with the assertion of the Defendant that he's no longer trusting of me to conduct this case in his behalf, I find it very difficult to proceed to a jury trial with that sort of background in the case.

November 16, 1984

Motion for new trial **hearing District Court** denied.

The Clerk: Your Honor, if I may the supervisor of the docketing section down there was looking through the attorney's directory when some of this had come up about two days ago and said something about he is not listed on our computer readout and permited to practice in this District. That's what I was going to call now and ask that individual to check again.

RT 27

The Court: We'll find out from the State Bar when the effective date of suspension is. He wasn't licensed to practice law. (Recess taken.)

The Court: I'm satisfied that we can go ahead with the sentencing this afternoon, and I'll put on the record the date for the suspension.

RT

Hearing November 15, 1984 - District Court

The Court: I think maybe the Court should make inquiry of Miss Hayes. There's a rumor that Mr. Squibb has a mental problem, drinking problem, or something to that effect. I think we better put something in the record.

Hearing October 4, 1984 - District Court

Mr. Squibb: The motion that is on calendar this morning is at the Defendant's request.

Trial First prosecution summation

Let's go to that statement. We have gone all through the trial. We have never really read the statement out loud. You've probably all been wondering what did Mr. Whaley say. At this time let me read this to you. It's short.

RT 223,224

When you go into the jury room — there's an english translation statement as well, which is basically the same as the other statement. It goes into a little more detail. For example, it says that he subsequently learned he was in a port called El Chaparrito. So you will have that available in the jury room. You can read it, but basically it's the same thing with some minor details that are different.

For example, it says, "as I sailed on the night of August 19th a storm arose," and it says that he left San Diego on the 2nd. Those really aren't inconsistent with —

At any rate, the signature on this statement Mr. Oleks did not want to make a positive identification. He said the two reports, and he stopped, he wouldn't speculate as to who made that signature, but right now I'll tell you that the Government is not relying on that signature on that statement. Mr. Oleks did not identify the signature on the spanish statement.

RT 226

Petitioner raised issue in the Ninth Circuit Court which gave an opinion and affirmed the District Court.

OPINION

Finally, Whaley argues that the District Court's denial of his October 10 motion to substitute Counsel deprived him of effective assistance of Counsel. "A District Court's refusal to substitute Counsel is reviewed for abuse of discretion." United States v. Rogers, 769 F.2d 1418, 1423 (9th Cir. 1985) (citation omitted). This Court will consider the following factors in reviewing such a denial: (1) timeliness of the motion; (2) adequacy of Court's inquiry into the Defendant's complaint;

and (3) whether the attorney-client conflict was so great that it resulted in a total lack of communication preventing an adequate defense. Id. Whaley cannot show ineffective assistance of Counsel absent demonstrated prejudice. Strickland v. Washington, 466 U.S. 668, 691-92 (1984).
The District Court's judgment is affirmed.

Petitioner contends all parties conceed all evidence circumstantial critical evidence i.e. ID. was completely unlawful. Without possession, market value, uncertified signed documents even testimony of identifying witnesses at scene, the U.S. did not have a cause.

Mr. Squibb defrauded family of Petitioner in the amount of $200.00

> In this Court Petitioner relies on the following;
> Strickland v Washington 466 U.S. 668
> Cuyler v Sullivan 446 U.S. 335 64 LGd 2d 333, 100 S. Ct. 1780 (1980)
> The conflict itself demonstrated a denial of the "right to have effective assistance of Counsel" 315 U.S. at 76 86 LEd 680, 62 S. Ct. 457. Thus a Defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.
>
> Twitty v Smith 614 F2d 325 (1976) p. 334 [6]
> Twitty's claim that he was denied effective representation because of Katsman's withdrawal of a motion for a mistrial in deference to his vacation plans, is more troublesome. Certainly an attorney placing his own interests ahead of his client's to the client's prejudice cannot be tolerated.
>
> Vriner v Hedrick 500 F. Supp 977 p. 982 [6]
> When an inherent conflict of interest is present a Court does not need to find in the record specific instances of conflict to establish violation of the accused's Constitutional rights. In such cases, the prejudice of the conflict lies not in what Counsel does but in what he holds back in doing.

Holloway v Ark 435 U.S. 475, 98 S. Ct. 1173, 55 LEd 2d 426 (1978)

p. 981 [1-3]

One aspect of the right to effective assistance of Counsel is the right to a Defense Counsel whose undivided loyalities lie with his accused client. Glasser v U.S. 315 60, S. Ct. 457, 86 LEd 680 (1942)

Moore v U.S. 432 F2d 730 (1970) p. 735 [2-4] "The adequacy of the representation which is the real issue in this case can only be decided on an evaluation of the services rendered on his behalf."

U.S. v Brown 663 F2d 229 (1981) p. 231 [1-3] A Defendant is of course entitled to the reasonably competent assistance of Counsel acting as a diligent, conscientious advocate. This means Counsel's professional judgement must be an informed judgement based on adequate preparation and knowledge of the facts and applicable law.

Whereas here the incompetency of Counsel is pervasive, the Defendant ought not to prove prejudice on top of inadequacy. The burden should be on the Government to establish the lack of prejudice. Holloway v Ark 453, 98 S. Ct. 1173, 55 L#d 2d 426 (1978)

. . . . . .

Concerning District Court denial of Petitioners right to proceed in proper person.

District Court Hearing - August 27, 1984

The Clerk: No. 27 on calendar, criminal case No. 85-5026, United States of Merica vs. Dorian Douglas Whaley for hearing motions and Jury trial setting.

Mr. Coughlan: Your Honor, Jerry Coughlan on behalf of Dorian Douglas Whaley, who is present in custody.

Ms. Hayes: Judith Hayes for the Government, Your Honor.

Mr. Coughlan: Your Honor, there are motions before the Court, which have been filed by Mr. Whaley personally. I simply communicated them to the Court on behalf of Mr. Whaley. We are prepared to go from there, I guess.

The Court: Mr. Whaley, do you want to speak to the motion that the indictment doesn't state a cause of action?

The Defendant Whaley: I would like to say that I have no desire to have Mr. Coughlan represent my interests any further.

The Court: You want him relieved as your attorney?

The Defendant Whaley: I do Your Honor, yes.

The Court: Are you able to hire someone else?

The Defendant Whaley: I would like to act in my own interest, use the library at the center there, and the option of procuring a counsel at a later date.

The Court: No.

The Defendant Whaley: Excuse me, Your Honor I intend to procure Counsel at some later date. I cannot be specific as to what date. I cannot be specific as to what date I'll be able to secure such counsel.

RT 4-5

In this Court Petitioner relies on the following:

Faretta v Calif 422 U.S. 806 45 LEd 562 S. Ct. 2525
p. 581 (12-13-14-15-16)

The right to defend is <u>personal</u>. It is the <u>Defendant</u>, therefore, who <u>must decide</u> whether in his particular case Counsel is to his advantage . . . his choice <u>must be</u> honored out of "that respect for the individual which is the lifeblood of the law".

p. 571 IIb

The right to the assistance of Counsel, the Court concluded, was intended to supplement the other rights of the Defendant, and not to impair "the absolute and primary right to conduct ones own defense in propria persona"
U.S.C. Title 28 section 1654
U.S. v Plattner 330 F2d 273
Pugach v Mancusi 310 F. Supp

Concerning bail issue.

Petitioner was not summoned to Court.

Arrest warrant recommended bail $5,000.00 corporate surety.

Magistrate upon arrest imposed bail of $20,000.00 corporate surety.

Magistrate upon rearraignment imposed bail of $15,000.00 corporate surety.

Petitioner moved pursuant to U.S.C. Title 18 section 3164 to gain pretrial release. Court denied Petitioner release prescribed, maintained bail of $15,000.00

The record will not disclose any good legitimate true cause why Whaley was continuously incarcerated from day of arrest without pretrial release 114 days. Under various oppressive unreasoned bails.

In this Court Petitioner relies on the following:

> U.S.S.C. DIGEST !. Ed. 3 p. 236
>
> "An accused cannot be denied release from detention because of indigence, but is Constitutionally entitled to be released on his personal recognizance where other relevant factors make it reasonable to believe that he will comply with the orders of the Court." Bandy v U.S. 82 S. Ct. 11 7 L. Ed 2d 9
>
> U.S.S.C. DIGEST L. Ed. 3 p. 226
>
> The provisions of the Eighth Amendment that excessive bail shall not be required means that a person may not be capriciously held and bars unreasoned denial of bail whether such denial is in the form of an outright holding without bail or in the form of a requirement of bail in an amount that staggers the imagination. CARLISLE v LANDON 73 S. Ct. 1179
>
> STACK v BOYLE 342 U.S. 1, 72 S. Ct. 1
> "Afactual showing is necessary"
>
> U.S.S.C. DIGEST Supra p. 226
> "bars and unreasoned denial of bail"

U.S.S.C. DIGEST Supra p. 245
"It is unconstitutional to fix excessive bail to assure that a Defendant will not gain his freedom.

U.S.S.C. DIGEST L. Ed. 3 p. 226
"The traditional right to bail before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right is preserved, the presumption of innocence would lose its meaning. STACK v BOYLE 342 U.S. 1 72 S. Ct. 1

. . . . . .

Concerning injury and oppression of Whaley's lawful Civil and Constitutional.

Petitioner pursuant to Rules of Appellate procedure Rule 11 (b) was injured and oppressed by Clerk, William W. Ruddy Deputy Clerk, Gregory J. Medieros, Court Reporter, T. Pat. Strobel to wit: The Clerk certified a false incomplete document "record of transcript."

Petitioner has not yet seen or possessed absent parts of record despite direct solicitation for same to Court and Reporter.

Petitioner wrote directly to Reporter to obtain absent parts of record of transcript to be delivered directly to Petitioner.

. . . . . .

Concerning injury and oppression of Whaley, lawful civil and constitutional rights.

Petitioner pursuant to Rules of Appellate procedure Rule 11 (b) was injured and oppressed by Clerk William W. Luddy, Deputy Clerk Gregory J. Medieros, Court Reporter T. Pat. Strobel to wit: The Clerk certified a false incomplete document "record of transcript".

Petitioner has not yet seen or possessed absent parts of record despite direct solicitation for same to court and reporter.

Petitioner solicits this Court to order Clerk William Luddy to produce and forward and deliver to Petitioner Whaley the absent parts of the record of transcript at issue.

Appeal Court Order

FILED

APR 10 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 85-5026
Plaintiff-Appellee,	DC# 84-0600-EBG Southern California
vs.	
DORIAN DOUGLAS WHALEY,	ORDER
Defendant-Appellant.	

Before: GOODWIN and SKOPIL, Circuit Judges

Stephen E. Hoffman, Esq.'s motion to withdraw as counsel of record is granted. New counsel will be appointed by separate order.

Counsel will designate the reporter's transcript by April 22, 1985. The reporter's transcript is due May 20, 1985.

EXHIBIT A B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Transcript Designation and Ordering Form

U.S. Court of Appeals Case No. CA 85-5026 U.S. District Court Case No. CR 82-600-C

Short Case Title U.S.A. v. Bailey

Date Notice of Appeal Filed by Clerk of District Court 2-20-85

SECTION A — To be completed by party ordering transcript

HEARING DATE	COURT REPORTER	PROCEEDINGS (strike portion not desired)
10-11-85	Strobel	Voir Dire
10-11-85	Strobel	Opening Statements
		Settlement Instructions
10-12-85	Strobel	Closing Arguments
10-12-85	Strobel	Jury Instructions
10-6-85		Pre-Trial Proceedings
8-8 10-27	Strobel	Other (please specify) Hearing & Cont. to
10-9-85 10-3	10-4, 11-15	01-16 12- 1-4, 4-18-85 & Sentencing

(attach additional page for designations if necessary)

FILED
ENTERED
LODGED
RECEIVED
JUN 11 1985
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

( ) I do not intend to designate any portion of the transcript and will notify all counsel of this intention.

( ) As retained counsel (or litigant proceeding in pro per), I request a copy of the transcript and guarantee payment to the reporter of the cost thereof upon demand. I further agree to pay for work done prior to cancellation of this order.

(X) As appointed counsel I certify that an appropriate order authorizing preparation of the transcript at the expense of the United States has been, or within 5 days hereof will be, obtained and delivered to the reporter. I agree to recommend payment for work done prior to cancellation of this order.

Date transcript ordered 4-19-85

Estimated date for completion of transcript 5-22-85

Signature of Attorney [signature] Phone Number 619-231-1182

Address: 108 Ivy Street, San Diego, CA 92101

SECTION C — To be completed by court reporter

When the transcript is filed, complete this copy and submit it to the U.S. district court with the completed transcript. District court will not file the transcript without this completed form.

Date Transcript Filed 6-12-85 Court Reporter's Signature [signature]

SECTION D

U.S. DISTRICT COURT CLERK: I certify that the record is available in the office of the U.S. District Court

WILLIAM W. LUDDY (U.S. District Court Clerk) 6-12-85 (Date) BY: GREGORY M. MEDEIROS DEPUTY CLERK

This copy is the CERTIFICATE OF RECORD. It should be transmitted to the court of appeals by the district court clerk when the transcript is filed and the record is complete in the district court.

EXHIBIT A

COPY THREE

Petitioner wrote directly to reporter to obtain absent parts of record of transcript delivered directly to Petitioner.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 15 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	No. 85-5026
	)	
Plaintiff-Appellee,	)	DC# CR 84-600-EBG
	)	Southern Californ'
vs.	)	
	)	
DORIAN DOUGLAS WHALEY,	)	ORDER
	)	
Defendant-Appellant.	)	
	)	
	)	

Before: ALARCON, Circuit Judge

Counsel for appellant informs the Court that the Certificate of Record was forwarded in error and that the reporter's transcripts are in fact incomplete. Court Reporter Strobel is directed to transcribe the designated proceedings of August 6, 1984 and October 3, 1984.

A briefing schedule will be established upon receipt of the amended Certificate of Record.

CR CAL 8/5/85

Concerning Court denial of Petitioners statutory right to selected expert witness

Rule 706 (d) Rules of evidence provides:
"Nothing in this rule limits the parties in calling expert witnesses of their own selection."

Petitioner had spanish speaking practioner of law at standby to engage as interpreter.

Trial October 11, 1984

> Secondly, Your Honor, Mr. Whaley has requested the presence of an interpreter to assist him as the spanish speaking witnesses are testifying. He feels that it would be appropriate to have an interpreter assist him to make sure that the translations are full and complete so he has made that request and asked me to convey it to the Court.
>
> The Court: Let me ask. Mr. Whaley, do you speak English?
>
> The Defendant Whaley: Yes, I do.
>
> The Court: So we will be using an interpreter here with the witness. The question will be asked and the interpreter will make a translation to the witness, and when the witness answers, the interpreter will then repear in open court what is said. And you speak English as good as I do. The Court —
>
> The Defendant Whaley: The objection I had, Your Honor, was the various subjective nature of the interpreter's understanding of the Federal Attorney's Questions —
>
> The Court: Well, your lawyer's questions, also. Your lawyer will be asking questions, also.

The Defendant Whaley: Yes, but the point I'm trying to make is the subjective nature of the procedure is such that there is really no objective way to make — I have it here — the subjective nature of the proceeding.

I would like to have an interpreter to analyze the statements of the Court's interpreter, or whoever — I don't know who provides the interpreter.

The Court: The Court does.

The Defendant Whaley: Okay. I imagine it would be a sworn interpreter. I would like to have the assistance myself of an interpreter to analyze the statements of that interpreter so that I may draw my own objective conclusions to the correctness of the statements of the interpreter. That's what I'm asking for.

The whole process in very subjective, and there is no objective basis to determine that her statements are in fact true and correct.

The Court: Well, I'm sorry, I'm afraid I'll have to deny that motion. I have a court interpreter and I have a court reporter. I can have a reporter check on the reporter and check on the reporter. But the words will be spoken that the witness is saying, and that will be up to your lawyer and you to draw conclusions as to what they mean. You may argue that to the jury.

I will have to deny that motion.

Petitioner relies on the plain meaning of language describing Rule 706 (d) Rules of Evidence.

UPON MY OATH BEFORE GOD PURSUANT TO S.C. RULE 19.3., S.C. RULE 28 A COPY OF PETITION OF WRIT OF CERTIORARI APPENDIX SUPPLEMENT WAS SERVED BY MAIL ON THE PERSON (s) LISTED BELOW:

- Judge Earl B. Gilliam
  U.S. Court House
  940 Front St.
  San Diego, Ca. 92101
- Judith Hayes, A.U.S.A.
  U.S. Court House Rm. 5N19
  940 Front St.
  San Diego, Ca. 92189
- Clerk
  Court of Appeals, Ninth Circuit
  7th & Mission Sts., P.O. Box 547
  San Francisco, Ca. 94101
- Reporter Thelma Strobel
  U.S. District Court Dept. 7
  940 Front St.
  San Diego, Ca. 92189
- Clerk Wm. W. Luddy, Deputy Clerk Gregory J. Medeiros
  U.S. District Court
  940 Front St.
  San Diego, Ca. 92189
- U.S. Attorneys Office, Appellate Division
  940 Front St.
  San Diego, Ca. 92101

Mailed Aug 30, 86
Dorian D Arkaley
AC NV 08601